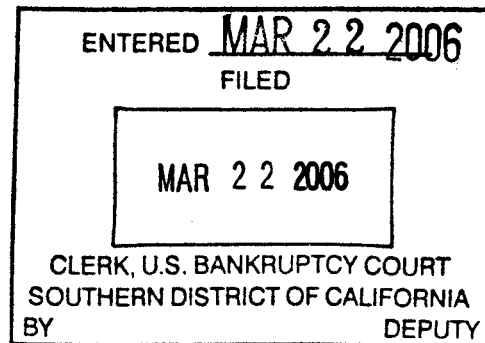


1 **WRITTEN DECISION - NOT FOR PUBLICATION**



8 UNITED STATES BANKRUPTCY COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

10

11 In re) Case No. 00-10958-B7.
12 JAY WALKER,) Adversary No. 01-90036-B7
13 Debtor.) MEMORANDUM DECISION
14)
15 BIO PRIME ENTERPRISES, INC.,)
16 Plaintiff,)
17 v.)
18 JAY WALKER,)
19 Defendant.)

20 This matter came on regularly for trial on plaintiff's claim
21 that the debt allegedly owed to it was nondischargeable pursuant
22 to 11 U.S.C. § 523(a)(6).

23 The Court has subject matter jurisdiction over this
24 proceeding pursuant to 28 U.S.C. § 1334 and General Order
25 No. 312-D of the United States District Court for the Southern

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1 District of California. This is a core proceeding under
2 28 U.S.C. § 157(b)(2)(I).

3 At the outset of trial, the parties offered certain
4 stipulations, which the Court accepted. The first was that if
5 Bio Prime prevailed on its complaint, the amount of damages that
6 would be nondischargeable is \$187,794. They also stipulated that
7 if defendant Walker were called to testify, he would state that
8 Mr. Lacerte and Mr. Kalenuik approached him, made clear to
9 Mr. Walker that they already had the intent to breach their
10 agreement with Mr. Najor and, through him, Bio Prime, and it was
11 only after that that Mr. Walker agreed to supply product directly
12 to Mr. Lacerte and Mr. Kalenuik.

13 Subsection (a)(6) of 11 U.S.C. § 523 provides:

14 (a) A discharge under section 727 . . .
15 does not discharge an individual debtor from
16 any debt -

17 . . .
18 (6) for willful and malicious injury
19 by the debtor to another entity or to the
20 property of another entity . . .

21 The United States Supreme Court had occasion to consider the
22 reach of § 523(a)(6) in Kawaauhau v. Geiger, 523 U.S. 57 (1998).
23 There, the Court noted:

24 The word "willful" in (a)(6) modifies
25 the word "injury," indicating that
26 nondischargeability takes a deliberate or
intentional injury, not merely a deliberate
or intentional act that leads to injury.

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1 523 U.S. at 61. Accordingly, the Court held "that debts arising
2 from recklessly or negligently inflicted injuries do not fall
3 within the compass of § 523(a)(6)." 523 U.S. at 64.

4 The facts in Geiger help explain the holding. The plaintiff
5 sought treatment for a foot injury from Dr. Geiger. He admitted
6 her to the hospital for treatment and intentionally chose a
7 course of oral penicillin over intravenous because of the
8 plaintiff's desire to minimize cost, although he knew intravenous
9 administration was more effective. Dr. Geiger left plaintiff in
10 the care of other physicians and went on a business trip. On his
11 return he found the doctors had referred the plaintiff to an
12 infectious disease expert. He cancelled the referral and ordered
13 the antibiotics discontinued because he thought the infection had
14 subsided. Plaintiff lost her leg, sued, and obtained a judgment.
15 Dr. Geiger carried no malpractice insurance, so the plaintiff
16 chased him into bankruptcy. There, the bankruptcy court found
17 the debt nondischargeable and the district court affirmed.

18 A panel of the Eighth Circuit reversed, and the court *en*
19 *banc* agreed, and held that § 523(a)(6) was "confined to debts
20 'based on what the law has for generations called an intentional
21 tort.'" 523 U.S. at 60. Before the Supreme Court plaintiff
22 argued that "Dr. Geiger intentionally rendered inadequate medical
23 care to [plaintiff] that necessarily led to her injury." Id. at
24 61. Plaintiff contended that Dr. Geiger "deliberately chose less
25 effective treatment because he wanted to cut costs, all the while
26 knowing that he was providing substandard care." Id. The

1 Supreme Court affirmed the Eighth Circuit's decision and rejected
2 the plaintiff's argument that Dr. Geiger's conduct met the
3 "willful and malicious injury" standard of § 523(a)(6).

4 Subsequent to Geiger, in In re Jercich, 238 F.3d 1201
5 (2001), the Ninth Circuit explained:

6 In Geiger, the U.S. Supreme Court held
7 that debts arising out of a medical
8 malpractice judgment, i.e., "debts arising
9 from reckless or negligently inflicted
10 injuries," do not fall within § 523(a)(6)'s
11 exception to discharge. In so holding, the
12 court clarified that it is insufficient under
13 § 523(a)(6) to show that the debtor acted
14 willfully and that the injury was negligently
15 or recklessly inflicted; instead, it must be
16 shown not only that the debtor acted
17 willfully, but also that the debtor inflicted
18 the injury willfully and maliciously rather
19 than recklessly or negligently.

20 238 F.3d at 1207.

21 The Ninth Circuit next examined "the precise state of mind
22 required to satisfy § 523(a)(6)'s "willful standard." Id. The
23 court concluded:

24 We hold . . . that under Geiger, the
25 willful injury requirement of § 523(a)(6) is
26 met when it is shown either that the debtor
had a subjective motive to inflict the injury
or that the debtor believed that injury was
substantially certain to occur as a result of
his conduct.

27 238 F.3d at 1208. The court then defined the separate
28 requirement of § 523(a)(6), maliciousness, as follows:

29 A "malicious" injury involves "(1) a
30 wrongful act, (2) done intentionally, (3)
31 which necessarily causes injury, and (4) is
32 done without just cause or excuse."

1 238 F.3d at 1209.

2 Still more recently, the Ninth Circuit looked at § 523(a)(6)
3 again, this time in In re Su, 290 F.3d 1140 (2002). There, the
4 debtor was driving a van in downtown San Francisco during the
5 morning rush hour. He went speeding into an intersection when
6 the light was already red, crashed into another car, then hit
7 plaintiff, a pedestrian lawfully crossing the street.
8 Plaintiff prevailed in state court and Mr. Su filed bankruptcy.
9 The bankruptcy court found the debt nondischargeable under
10 § 523(a)(6), but the BAP reversed, holding the court applied the
11 wrong legal standard. The Ninth Circuit affirmed the BAP. As
12 the Ninth Circuit put it:

13 The question presented on appeal is whether a
14 finding of "willful and malicious injury"
15 must be based on the debtor's subjective
16 knowledge or intent or whether such a finding
17 can be predicated upon an objective
18 evaluation of the debtor's conduct.

19 290 F.3d at 1142. The court then stated its conclusion:

20 We hold that § 523(a)(6)'s willful injury
21 requirement is met only when the debtor has a
22 subjective motive to inflict injury or when
23 the debtor believes that injury is
24 substantially certain to result from his own
25 conduct.

26 Id.

27 In rejecting the objective standard used by the bankruptcy
28 court, the appellate court stated its view:

29 [F]ailure to adhere strictly to the
30 limitation expressly laid down by In re
31 Jercich will expand the scope of
32 nondischargeable debt under § 523(a)(6) far

1 beyond what Congress intended. By its very
2 terms, the objective standard disregards the
3 particular debtor's state of mind and
4 considers whether an objective reasonable
5 person would have known that the actions in
6 question were substantially certain to injure
7 the creditor. In its application, this
8 standard looks very much like the "reckless
9 disregard" standard used in negligence. That
10 the Bankruptcy Code's legislative history
11 makes it clear that Congress did not intend §
12 523(a)(6)'s willful injury requirement to be
13 applied so as to render nondischargeable any
14 debt incurred by reckless behavior reinforces
15 application of the subjective standard. The
16 subjective standard correctly focuses on the
17 debtor's state of mind and precludes
18 application of § 523(a)(6)'s
19 nondischargeability provision short of the
20 debtor's actual knowledge that harm to the
21 creditor was substantially certain.

22 290 F.3d at 1145 - 1146.

23 Facts

24 Most of the underlying facts are relatively straightforward.
25 The debtor, Jay Walker, was at relevant times the president, and
26 sole direct employee of an entity called United States Medical
Research Foundation (USMRF). On or about September 26, 1997
Walker executed an agreement on behalf of USMRF which purported
to grant to Bio Prime Enterprises, Inc. the exclusive
distribution rights of human grown hormone products manufactured
by USMRF.

Article I of the Agreement recites:

1.1. USMRF owns and holds the exclusive
rights and proprietary information and
formulation of certain human grown hormone
products. These products are currently being
manufactured by USMRF and are being
distributed in the United States.

1 1.2. Bio Prime desires to become the
2 exclusive distributor with exclusive rights
3 to package, market and transfer distribution
4 rights for the human grown hormone product
5 ("Product") on the terms and conditions set
6 forth in this Agreement.

7 The term "Product" is defined in Article 2.2:

8 2.2. The "Product" means those products
9 which are currently produced by USMRF as
10 human grown hormone products and currently
11 marketed as Regenesiis 1, together with any
12 enhancements, improvements, or other
13 formulations of such products.

14 Article 3 of the Agreement has three important subparts:

15 3.1. In consideration of the mutual
16 covenants herein contained USMRF hereby
17 grants to Bio Prime, and Bio Prime hereby
18 accepts, the exclusive worldwide rights to
19 package, market and transfer distribution
20 rights for the Product.

21 3.2. Nothing herein shall prohibit Bio
22 Prime from appointing one or more packaging
23 and or distribution agents

24 3.3. Notwithstanding any other
25 provision of this Agreement, the parties
26 acknowledge, agree and understand that the
actual ownership of the Product and the
formula for the Product shall at all times
during the term of this Agreement, remain the
property of USMRF.

Finally, Article 7 has two relevant subparts:

 7.2. In the course of performing its
obligations hereunder, Bio Prime will have
access to and become acquainted with trade
secrets and proprietary information of USMRF.
Bio Prime shall not disclose any such
information or use all or any portion of it
in any way, either directly or indirectly at
any time during the term of this Agreement.

 7.3. So long as Bio Prime is in
conformance with all of the terms and
conditions of this Agreement, USMRF shall not

1 license the sale, distribution, marketing or
2 packaging of the Product to any third party.

3 Ramsey Najor signed the Agreement for Bio Prime as its president,
4 as did Mr. Walker for USMRF. Roy Dittman also signed the
5 Agreement, as vice president of Bio Prime.

6 The testimony of Mr. Najor was uncontroverted that after
7 entering into the exclusive distributorship agreement with USMRF,
8 Bio Prime spent about \$200,000 on developing marketing materials
9 that met FDA guidelines for nutritional supplements; caused
10 clinical and double-blind studies to be performed; and developed
11 the spray form for delivery of the product to replace the
12 eyedropper method used by USMRF.

13 On or about April 29, 1998 Mr. Najor, Phil Lacerte and Sam
14 Kalenuik signed a letter of understanding (LOU) for the formation
15 of a multi-level marketing entity (MLM Entity) to distribute
16 certain products. The entity was to be incorporated in Nevada,
17 and Mr. Najor was to have a 30% ownership interest. Mr. Lacerte
18 was to supply the initial financing up to \$2.5 million and
19 Mr. Najor "shall provide the Parties with a certificate of
20 authorization from Bio Prime, granting Ramsey authority to enter
21 into a 5-year distribution agreement . . . for the distribution
22 of Regenesiis (the 'Product')."

23 The LOU contained exclusive pricing provisions with required
24 minimum purchases, and reflected "a 5-year guaranteed \$10.00/unit
25 discount below that of any other distribution for the Product."
26 Paragraph 10 of the LOU recited, in part: "Ramsey and Jay Walker

1 will provide the MLM Entity with a written mechanism for the
2 alternative manufacturing of the Product" Paragraph 13
3 provided:

4 The MLM Entity shall obtain and maintain
5 during the term of the Distribution Agreement
6 . . . key-man insurance policies covering
7 Ramsey Najor and Jay Walker for the benefit
8 of the MLM Entity

9 Paragraph 14 set out certain conditions which were to be met
10 before "consummation of this transaction". The conditions
11 included:

12 (i) the negotiation and execution of
13 definitive agreements and related
14 documentation and representations with terms
15 and conditions as outlined . . . , (ii) the
16 completion of the Distribution Agreement with
17 Regenesiis

18 Lastly, paragraph 16 stated: "This letter shall serve as a
19 binding agreement upon the Parties, subject to the terms and
20 conditions hereof and shall serve as a basis to proceed with this
21 transaction."

22 It is to be remembered that the LOU was signed on April 29,
23 1998. Things happened quickly after that. A letter dated
24 May 4, 1998, on USMRF letterhead, addressed to Mr. Najor, stated
25 that USMRF had granted Bio Prime "exclusive worldwide marketing
26 rights to sell the Regenesiis HGH product line" (Ex. 10)
27 On or about May 15, 1998 Bio Prime issued an invoice for 10,000
28 units of Regenesiis 1 (Ex. 72), which apparently was picked up the
29 same date for delivery to Mr. Kufus, who was identified in the

30 ///

1 LOU as someone authorized to distribute under the MLM Entity to
2 be created under the LOU.

3 Then, by letter dated May 20, 1998 and sent by Federal
4 Express, a Salt Lake City law firm employed by Lacerte and
5 Kalenuik notified Mr. Najor that they were terminating the
6 negotiations under the LOU. Specifically, the letter asserted:

7 As you well know, Mr. Lacerte and
8 Mr. Kalenuik have made substantial
9 commitments and incurred considerable
10 expenses associated with acquiring the
11 distribution rights and to developing
12 marketing and other materials for
13 distributing Regenesi based on your
14 representations relating to your distribution
15 rights.

16 As they have made inquiry and conducted
17 their due diligence in connection with
18 substantiating your representations, they
19 have developed serious concerns regarding
20 some of the representations you have made to
21 them with respect to any distribution rights
22 you may actually have and your ability or
23 authority to actually enter into a
24 distribution agreement as was originally
25 contemplated.

26 Therefore, we have advised Mr. Lacerte
and Mr. Kalenuik to place you on notice that
they are hereby terminating negotiations with
you regarding this transaction and
withdrawing any letters of understanding
relating to the contemplated transaction
until such time, if ever, as they and their
counsel have been provided with information
and documentation satisfactory to them that
you in fact have such distribution rights or
are authorized to enter into any agreements
relating thereto

Ex. 88. Two days later, the law firm faxed a second letter,
stating: "this letter is to reiterate and make absolutely clear
to you that Mr. Phil Lacerte and Mr. Sam Kalenuik have terminated

1 all negotiations with you and withdrawn all letters of
2 understanding relating to the above referenced matter." Ex. 89.

3 It was not made clear during the trial, but some of the
4 confusion regarding Bio Prime's and Mr. Najor's distribution
5 rights may have arisen from the settlement of the breakup of
6 business relations between Mr. Najor and Mr. Dittman in their
7 ownership and management of Bio Prime. As of March 27, 1998
8 Mr. Najor became the sole owner of Bio Prime. However, the
9 Agreement recited, in relevant part:

10 4. Bio Future and Bio Prime Enterprises,
11 Inc. will retain their worldwide marketing
12 rights of hGH hormone from United States
13 Medical Research Foundation upon approval of
14 USMRF. Any other uses of hGH products
15 purchased from USMRF requires their written
16 approval. Any exclusive delegation of these
17 rights to any person or organization will
18 require the written agreement of USMRF.

19

20 6. Bio Prime Enterprises, Inc. maintains the
21 legal rights to the trade names, Regensis 1
22 and Regensis Pro (trade market under DBA Bio
23 Prime Enterprises, Inc.).

24 Ex. 127. Neither USMRF nor Mr. Walker were a party to that
25 agreement. However, Mr. Najor's uncontroverted testimony was
26 that Mr. Walker was on the board of Bio Prime during the time of
the separation, and Mr. Walker personally helped broker it.

At some time prior to May 29, 1998 Mr. Walker and
Mr. Lacerte were in contact with each other. Pursuant to
stipulation, Mr. Walker would have testified that he was told
Mr. Lacerte and Mr. Kalenuik had already determined to sever

1 their relationship with Mr. Najor and Bio Prime. Mr. Walker
2 would have testified that it was only after learning that
3 information that he then agreed to supply product directly to
4 Quantum Leap.

5 By letter agreement dated May 29, 1998, USMRF authorized
6 Mr. Biden to act as its agent in transferring exclusive worldwide
7 marketing rights to Quantum Leap and its principals consistent
8 with certain deal points contained in the agreement. Exhibit 97.
9 That document was followed by a distribution agreement (Ex. 103)
10 between Biden and Quantum Leap, dated June 25, 1998, with an
11 acknowledgment and agreement to comply signed by Mr. Walker. The
12 terms of the agreement, including 32% of the ownership of Quantum
13 Leap to be transferred to USMRF and its agent, were very similar
14 to the terms of the LOU between Mr. Najor, Mr. Lacerte and
15 Mr. Kalenuik.

16 Discussion

17 After distilling both the documentary and testimonial
18 evidence, the Court finds that in September, 1997 Mr. Walker
19 signed an agreement for USMRF granting exclusive distribution
20 rights to Bio Prime Enterprises. In or about October, 1997
21 Mr. Walker was put on the board of Bio Prime and, according to
22 Mr. Najor, was consulted on most everything. In April, 1998
23 Mr. Najor entered into a Letter of Understanding to create a
24 multi-level marketing entity to market product Bio Prime will
25 purchase from USMRF. Mr. Najor testified Mr. Walker was
26 consulted throughout the negotiations as to price, quantity and

1 authority. The LOU itself called for certain things involving
2 Mr. Walker by name, including keyman insurance and an alternative
3 manufacturing mechanism to avoid disruption in delivery of the
4 product. Bio Prime received an initial order from Quantum Leap
5 for 10,000 bottles and at least by the time of delivery
6 Mr. Walker knew who was receiving it, and likely knew the mark-up
7 Bio Prime was receiving over what it paid USMRF. Sometime
8 after the first order, around May 15, and before May 29, 1998,
9 Mr. Walker and Mr. Lacerte were in contact. In the meantime,
10 Mr. Lacerte's lawyers, by letters dated May 20 and May 22, told
11 Mr. Najor they were breaking off negotiations to complete the
12 agreement contemplated by the LOU.

13 The evidence adduced at trial does not establish whether
14 Mr. Lacerte approached Mr. Walker, or the other way around,
15 although Mr. Walker would have testified to the former.
16 Mr. Lacerte had created Quantum Leap, had paid \$250,000 for
17 10,000 bottles, had signed an LOU calling for a minimum purchase
18 in 1998 of 100,000 bottles, and had his lawyers send letters to
19 break off negotiations with Mr. Najor five days after the first
20 order.

21 Mr. Walker was on the board of Bio Prime from October, 1997
22 to June, 1998. He knew that Bio Prime had invested in developing
23 the packaging, testing, and delivery mechanism for the product.
24 He knew that Mr. Najor had negotiated a Letter of Understanding
25 to market significant quantities of the product his business
26 makes, and knew the prices charged for it in contrast with what

1 he would receive from Bio Prime. He aided the process by
2 providing his May 4 letter stating that Bio Prime had a written
3 contract granting it exclusive worldwide marketing rights to the
4 Regenesiis product line. Before the end of the same month,
5 Mr. Walker had made his own deal with Quantum Leap, through his
6 agent, Mr. Biden.

7 So, the issues are whether Mr. Walker owes a debt to Bio
8 Prime for his conduct, and whether that debt is a
9 nondischargeable one under 11 U.S.C. § 523(a)(6). The first
10 issue can be disposed of in short order because it is based on
11 the mistaken notion that the corporate form of USMRF somehow
12 insulates Mr. Walker from any liability for his personal conduct
13 while acting ostensibly on behalf of USMRF. This case does not
14 involve an instance of trying to hold an individual's assets
15 accountable for a liability of a corporate entity because of all
16 the elements that might justify a piercing of a corporate veil.
17 To the contrary, this case involves a determination of whether
18 Mr. Walker's personal conduct makes him liable for its
19 consequences.

20 Although it claims to have reserved other theories of
21 liability, Bio Prime has focused on asserting that Mr. Walker
22 intentionally interfered with Bio Prime's prospective economic
23 advantage. Under California law, the elements of such a claim
24 are: 1) an economic relationship existed between the plaintiff
25 and a third party, containing a probable future economic benefit
26 or advantage to plaintiff; 2) the defendant knew of the existence

1 of the relationship; 3) the defendant engaged in wrongful conduct
2 designed to interfere with or disrupt the relationship; 4) the
3 defendant did so with the intent to interfere with or disrupt
4 this relationship, or with the knowledge that the interference or
5 disruption was certain or substantially certain to occur as a
6 result of his action; 5) the economic relationship was actually
7 interfered with or disrupted; and 6) the wrongful conduct of the
8 defendant which was designed to interfere with or disrupt this
9 relationship caused damage to the plaintiff. BAJ1 7.82 (2003
10 Revision).

11 Mr. Walker has attempted to create an issue concerning the
12 fact that the LOU was between Lacerte, Kalenuik and Najor, not
13 Bio Prime. However, the LOU itself, at paragraph 7, recognizes
14 that Bio Prime is the source of Najor's authority. The Court
15 finds and concludes there was an economic relationship between
16 Bio Prime, through Najor, and Lacerte and Kalenuik, pursuant to
17 which Bio Prime had a present economic benefit and an expectancy
18 of a probable future one.

19 It is clear that Mr. Walker knew of the existence of the
20 relationship; that the economic relationship was actually
21 interfered with; and that Bio Prime was damaged as a result, thus
22 satisfying the second, fifth and sixth elements.

23 The third element requires that the defendant engage in
24 "wrongful conduct" designed to interfere with the relationship.
25 BAJ1 7.86.1 (2003 Revision) defines "wrongful conduct". It
26 provides:

1 "Wrongful conduct" is conduct that is
2 wrongful separate and apart from the fact
3 that the conduct interfered with or disrupted
4 the economic relationship between the
5 plaintiff and the defendant, and is also
6 wrongful in the sense that the conduct
7 violated a statute, or considered by itself
8 constitutes the basis for a claim of [some
9 other cause of action].

6 The rationale behind requiring "wrongful conduct" is clear. Most
7 competition, by definition, interferes with another's hope or
8 expectation to sell to the same customer. But regular
9 competition is privileged, as recognized in BAJ1 7.86. So
10 unprivileged interference must be wrongful in some independent
11 way, such as by violation of some constitutional, statutory,
12 regulatory, common law or other prohibition. Here, Mr. Walker's
13 wrongful conduct begins with the breach of his duties as a member
14 of the board of Bio Prime, in taking business away from Bio Prime
15 by contracting for the same business directly. It was also
16 wrongful for Mr. Walker to give Mr. Biden authority to transfer
17 exclusive distribution rights to Quantum Leap when he had already
18 transferred those same rights to Bio Prime. It was also wrongful
19 conduct for Mr. Walker to take the same product and sell it as
20 Regenesis when he testified in deposition without controversion
21 that the name Regenesis was owned by Najor and Dittman, or by Bio
22 Prime. He also testified that he believed USMRF never owned or
23 asserted ownership rights in the name Regenesis 1, but Ex. 86
24 makes clear that product was produced and sold under that label
25 after May 29, and after June 25. When Mr. Walker changed the
26 name of the product to Life Span, it was still the same formula,

1 delivery system, quantity and the like. The Court finds and
2 concludes that Mr. Walker engaged in wrongful conduct within the
3 meaning of the requisite element 3 for intentional interference
4 with prospective economic advantage.

5 That leaves the fourth element - that Mr. Walker acted with
6 the intent to interfere with or disrupt the relationship, or with
7 the knowledge that the interference or disruption was certain or
8 substantially certain to result from his conduct. It is clear
9 that if Mr. Walker contracts directly with Bio Prime's client,
10 Bio Prime will lose that business, as it indeed did. He had to
11 know that would be the consequence of his direct contract with
12 Quantum Leap, made through USMRF's agent, Mr. Biden.

13 Mr. Walker has claimed that Mr. Lacerte and Mr. Kalenuik
14 approached him. Mr. Najor testified that Mr. Walker told him
15 later that Mr. Lacerte and Mr. Kalenuik did not like Mr. Najor,
16 didn't want to do business with him, but still needed the
17 product, suggesting that is why they went to the source. The
18 Court's view of the evidence is that it is more probable that
19 Mr. Walker precipitated the subsequent withdrawal of Lacerte and
20 Kalenuik from the LOU based on the timing and sequence of events.
21 As we know, the LOU was dated and signed April 29, 1998. On
22 May 4, Mr. Walker provided Mr. Najor with the letter showing Bio
23 Prime had the exclusive rights to market. By May 15, the first
24 order of 10,000 bottles was placed and picked up the same day,
25 and \$250,000 was paid. So at that point, Mr. Lacerte and
26 Mr. Kalenuik had invested a quarter of a million dollars into

1 product, delivered to one of their distributors to be resold.
2 They had signed an LOU only 16 days before calling for 100,000
3 bottles for the remainder of the year. Yet five days later their
4 lawyers said they are withdrawing. Having set up at least the
5 first stages of a distribution system and investing a significant
6 sum for the first product, it seems highly unlikely they would
7 withdraw from their source agreement unless they had already made
8 alternative arrangements. The Court cannot know for sure which
9 party first contacted the other, but it seems likely that
10 Mr. Walker contacted Mr. Lacerte, rather than the other way
11 around, in particular because Mr. Walker and USMRF had the most
12 to gain. The product was going to cost Quantum Leap
13 approximately the same amount whether they got it from Mr. Najor
14 and Bio Prime, or from Mr. Walker and USMRF. However, USMRF and
15 Mr. Walker would not only receive their base price, but also the
16 mark-up that Bio Prime would otherwise receive. Given the speed
17 with which the change was made, it seems more likely that it was
18 at Mr. Walker's instigation. It seems likely, also, that the
19 ground given by Mr. Lacerte's lawyers, that there was an issue
20 about Mr. Najor's authority to provide Quantum Leap with
21 distribution rights, had to have come from Mr. Walker, given
22 Mr. Walker's May 4 letter declaring that Bio Prime did have the
23 marketing rights.

24 The Court finds and concludes that Mr. Walker knew that
25 interference and disruption of Bio Prime's and Najor's economic
26 relationship with Mr. Lacerte and Mr. Kalenuik would result from

1 his making a contract with them directly and cut out Bio Prime
2 and Mr. Najor from the chain. Accordingly, the Court finds and
3 concludes that Mr. Walker does owe a debt to Bio Prime for his
4 conduct.

5 The remaining issue is whether what the Court has found
6 meets the elements of § 523(a)(6), and therefore renders Mr.
7 Walker's debt to Bio Prime nondischargeable. As already noted,
8 the statute has two prongs: 1) that the conduct was willful, and
9 2) that it was malicious. The "willful" prong is established if
10 "it is shown either that the debtor had a subjective motive to
11 inflict the injury or that the debtor believed that injury was
12 substantially certain to occur as a result of his conduct." In
13 re Jercich, 238 F.3d at 1208. As made clear in In re Su, 290
14 F.3d 1140, 1142 (9th Cir. 2002), the debtor must have a subjective
15 motive to inflict injury or the debtor must believe that injury
16 is substantially certain to result from his actions. As already
17 stated, the Court has found that Mr. Walker knew injury to Bio
18 Prime and Mr. Najor was substantially certain to result from his
19 conduct.

20 The second prong of § 523(a)(6), maliciousness, requires:
21 "(1) a wrongful act, (2) done intentionally, (3) which
22 necessarily causes injury, and (4) is done without just cause or
23 excuse." In re Jercich, 238 F.3d at 1209. The Court has already
24 found that Mr. Walker acted intentionally, and that his conduct
25 necessarily caused injury. No just cause or excuse has been
26 proffered, and the Court does not credit Mr. Walker's claim that

1 he was contacted after Mr. Lacerte and Mr. Kalenuik had already
2 determined to withdraw from the LOU. But even if that were true,
3 Mr. Walker still had duties to Bio Prime as a member of its
4 board, which his conduct breached.

5 The final question, not unlike the central issue in
6 Kawaauhau v. Geiger, 523 U.S. 57 (1998), is whether the nature of
7 Mr. Walker's conduct is the sort of conduct Congress had in mind
8 when it wrote § 523(a)(6). As subsequent courts have noted,
9 § 523(a)(6) was aimed at the traditional intentional torts. Is
10 intentional interference with prospective economic advantage one
11 of those? It appears that the elements of the state tort match
12 the requirements of § 523(a)(6). The tort requires an intent to
13 interfere or disrupt, or knowledge that it is "certain or
14 substantially certain" to result, which appears to match the
15 Jercich requirement. The tort requires knowledge and, most
16 importantly, it requires that the conduct itself be wrongful in
17 some way.

18 Conclusion

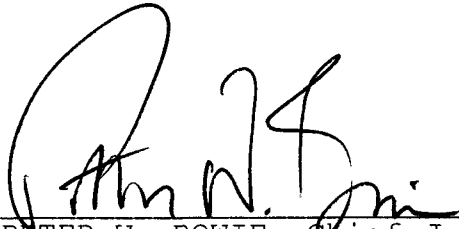
19 Based on the evidence adduced at trial, coupled with the
20 arguments of the parties and consideration of the applicable
21 authorities, the Court finds that Bio Prime has met its burden of
22 establishing that Mr. Walker owes it a debt that is
23 nondischargeable pursuant to 11 U.S.C. § 523(a)(6). The amount
24 of the debt, if one was found to exist, was established by
25 stipulation at the outset of the trial to be \$187,794.00.

26 ///

1 Counsel for plaintiff shall prepare and lodge, or obtain
2 approval as to form from defendant's counsel, a separate form of
3 judgment consistent with this Memorandum Decision within thirty
4 (30) days of the date of entry of this Memorandum Decision.

5 IT IS SO ORDERED.

6 DATED: MAR 22 2006

7
8 
9 PETER W. BOWIE, Chief Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re Adversary Case No. 01-90036-B7
Bankruptcy Case No. 00-10958-B7

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

MEMORANDUM DECISION

was enclosed in a sealed envelope bearing the lawful frank of the Bankruptcy Judges and mailed to each of the parties at their respective address listed below:

Attorney for Plaintiff:

Joseph D. Curd, Esq.
Curd, Galindo & Smith, LLP
301 East Ocean Boulevard,
Suite 460
Long Beach, CA 90802

Attorney for Defendant:

David Blake, Esq.
215 South Highway 101,
No. 213
Solana Beach, CA 92075

Said envelope(s) containing such document were deposited by me in a regular United States mail box in the City of San Diego, in said district on March 22, 2006.


Barbara J. Kelly, Deputy Clerk